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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

No. 84-1306

CHARLES B. BAKER, JR., Petitioner

vs.

JOAN A. BAKER, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MAINE

RESPONDENT'S BRIEF IN OPPOSITION

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April 12, 1985

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OPINION BELOW

The opinion of the Supreme Judicial Court of Maine was unreported at the time the Petition was filed. It appears at 483 A.2d 733 (Me. 1984).

STATEMENT OF THE CASE

Petitioner and respondent were divorced and a divorce judgment was entered by the Ninth District Court, Division of Southern Cumberland, State of Maine, on September 21, 1973. That judgment ordered petitioner to pay respondent $1,200 per month as alimony, until the death or remarriage of the respondent. The petitioner subsequently moved to California. By letter to the respondent dated June 2, 1982, the petitioner informed her that no further alimony payments would be made.[1]

The respondent attempted to enforce payment of the alimony arrearages in the Maine District Court on several occasions, beginning with the filing of a Complaint for Enforcement of Decree of Court in July, 1982.[2] By order dated July 6, 1982, the court directed that service of the respondent's complaint be made upon the petitioner by certified mail, return receipt re-

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1. Prior to that date, petitioner had engaged Maine counsel and had brought, in the same district court, a Motion to Amend the Divorce Decree, seeking to reduce the alimony payments ordered. Petitioner's motion was withdrawn by counsel's letter to the Court dated June 1, 1982.

2. Pursuant to Me. Rev. Stat. Ann. tit. 14, §252, respondent initially brought an action for summary process against petitioner to show cause why he should not be held in contempt of court for failure to comply with so much of the divorce judgment as required him to pay alimony to the respondent. This complaint was dismissed in February, 1983. Respondent subsequently brought motions for enforcement of decree of alimony under Me. Rev. Stat. Ann. tit. 19, §774, which, on motion to enforce a decree of alimony, authorizes the court to make a finding of money due, render judgment for that amount and order alternate methods of collecting the judgment, including attachment and garnishment of wages.

quested. By affidavit dated December 13, 1982, the respondent's attorney stated that the certified letters were returned marked "unclaimed" despite efforts to serve the petitioner by mailing plain envelopes from Portland, Maine and from Washington, D.C., to two separate addresses which the respondent had been informed were possible residences of the petitioner. The affidavit also stated that messages had been left on petitioner's telephone answering machine, and that an investigation was made to determine the petitioner's current address and the name of a California attorney known to be representing the petitioner in unrelated probate proceedings. The investigation showed the address listed by the petitioner for the probate proceedings was P.O. Box 911, Del Mar, California, the identical post office box address formerly used in petitioner's June 2, 1982 letter to the respondent, and that the attorney was Richard Kinney, Esq.

Counsel for petitioner entered his special appearance on January 11, 1983. Following a hearing in February, 1983, the District Court dismissed the respondent's amended Complaint for Enforcement of Alimony for lack of personal jurisdiction[3] in that no proper service of the complaint upon the petitioner was demonstrated by the record. The court then entered its order that a hearing on any subsequent motion for enforcement to be filed by respondent be held on March 23, 1983, and that notice of the hearing be given to the petitioner by certified mail, addressed to him at P.O. Box 911, Del Mar, California, return receipt requested, pursuant to Maine District Court Civil Rule 4(f), with a copy of the order and of the motion to be sent by ordinary mail

3. Throughout the proceedings in Maine, petitioner contended that the court lacked personal jurisdiction over him due to the alleged deficiencies in service of process. Since the parties were divorced in Maine, the State retained personal jurisdiction over the parties for the purpose of any future amendments to or enforcement of the decree. *Elliot v. Elliot*, 431 A.2d 55, 57 (Me. 1981). The petitioner is entitled to reasonable notice of such further proceedings, *Griffin v. Griffin*, 327 U.S. 220 (1946), but as the Supreme Judicial Court of Maine recently decided in *Elliot*, service of post judgment divorce motions is a matter of procedure, not jurisdiction.

to Richard R. Kinney, Esq., petitioner's attorney for his mother's estate proceedings.[4]

At a third hearing on March 23, 1983, the court had before it the affidavit of respondent's attorney dated March 16, 1983, in which he detailed his correspondence with California counsel (another attorney in the firm of Richard Kinney) in attempting to negotiate a resolution of the alimony dispute, and attached as exhibits copies of the letters from California counsel. These letters not only included the accurate Maine District Court docket number for the proceedings, but included the statement that, "this office represents Mr. Baker for the purpose of attempting to negotiate a resolution of the referenced dispute." Respondent's attorney further swore to his continued efforts to track down Mr. Baker by mail.

The court again dismissed respondent's Motion for Enforcement for lack of personal jurisdiction, but, upon the motion of the respondent, ordered on March 25, 1983 that alternate service of a subsequent motion for enforcement be made by the following means: sending to petitioner a notice of the hearing by certified mail at the Del Mar, California post office box address; mailing notice of the hearing to that address, by ordinary mail with a request to forward, if necessary; sending by ordinary mail notice of hearing to Richard R. Kinney, Esq.; publishing notice in accordance with Maine District Court Civil Rule 4(g); and making a diligent and earnest effort to serve petitioner in hand. The court stated that if after diligent effort by the respondent, personal service of the petitioner could not be effected, com-

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4. As of March 23, 1983, the postal authorities had neither returned the receipt nor the envelope marked "unclaimed" or "refused" from California. The envelope addressed to petitioner was eventually returned marked "unclaimed" on April 22, 1983, nearly two months after it was mailed.

   Rule 4(f) permits service of a non-resident defendant by registered or certified mail, with restricted delivery and return receipt requested, in only two types of actions: an original action for a divorce judgment or an action affecting the interest in or title to real property. In all other proceedings, a non-resident defendant who is subject to the jurisdiction of the state must be served either personally, Rule 4(e), or by publication, Rule 4(g).

pliance with the other methods of service would be sufficient.

On May 11, 1983, the petitioner again moved to dismiss for lack of personal jurisdiction. The affidavit of respondent's attorney dated May 10, 1983, was submitted to the court, showing full compliance with the court's order of March 25, 1983. The affidavit described further unsuccessful efforts by the respondent to serve personally the petitioner, including as an exhibit the Declaration for Publication of Michael Monzone, a San Diego County, California, registered process server. Monzone's affidavit detailed his extensive efforts to locate the petitioner, but concluded that he was unable to determine the whereabouts of the petitioner in San Diego County. Finally, submitted to the court was the letter which had been sent certified mail to the petitioner on March 29, 1983, and although marked with a "return" stamp by the Post Office, was not marked either "refused," "accepted," or "unclaimed."

On May 13, 1983, the District Court entered its order finding that the respondent had complied with the court's order of March 25, 1983, and therefore denying petitioner's Motion to Dismiss for lack of jurisdiction. The court's specific findings of fact and conclusions of law were entered on May 26, 1983, in which the court found that respondent's attempts to serve petitioner through registered mail and through petitioner's counsel in California constituted a sufficient showing of due diligence to authorize service by publication.

On June 21, 1983, the District Court granted respondent's Motion for Enforcement of Alimony and entered judgment for the respondent in the amount of $15,600.00.

The respondent concurs in so much of the Statement of the Case as presented by the petitioner which recites the procedural history of the case thereafter.

REASONS WHY THE WRIT SHOULD BE DENIED

1. JUDICIAL INQUIRY INTO THE ADEQUACY OF SUBSTITUTED SERVICE IS ALREADY CONSTITUTIONALLY REQUIRED BY *MULLANE V. CENTRAL HANOVER BANK & TRUST CO.*, AND NO MORE RIGID FORMULA IS NECESSARY.

The petitioner asks this Court to establish a standard to determine the reasonableness and sufficiency of notice of process which, in fact, has existed since 1950. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 311 (1950), the Court was presented with the need to balance the individual's right to due process against the interest of the state to bring issues to final settlement, and established the minimum requirements of due process as "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314; *cited in: Greene v. Lindsey,* 456 U.S. 444, 449 (1982); *Walker v. City of Hutchinson,* 352 U.S. 112, 115 (1956). Recognizing the fallacy of dictating rules governing notice which could in all cases meet this requirement, the Court concluded that:

> "the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, . . . or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes."[5]

Mullane at 315.

Although personal service guarantees actual notice of the pendency of a legal action, certain less rigorous notice procedures have been accepted in light of the practical obstacles to providing personal service in every instance, provided that the constitutional minimum recited in *Mullane* is met. *See: Greene* at 455.

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5. In *Mullane,* the Court concluded that notice by publication to those individuals with vested rights in a trust fund, and whose addresses were readily available to the trustee, was invalid. The Court specifically recognized that mailed notice to known beneficiaries would be a valid alternative, and did not require personal service. *Id.* at 319.

This Court has refused to establish a more rigid standard than that declared in *Mullane*, and in so doing, has declined to elevate form over substance. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). *See: Cafeteria and Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961). Similarly, the Court has called attention to "the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions." *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956).

The involved factual history and circumstances of this case prove the need for a flexible approach to due process procedures. No single formula beyond *Mullane's* directives could be created which could anticipate the myriad circumstances confronting litigants who must substitute alternatives to service in hand. *Mullane's* guidelines permitted the Maine District Court to fashion, within the statutory framework, an order which was reasonably calculated under the circumstances to apprise this particular non-resident defendant of the action brought against him.

Judicial inquiry into the reasonableness of substituted service is constitutionally required, but petitioner's contention that the District Court's inquiry was mis-timed is not only erroneous, but when viewed in light of the circumstances of the case and the actual notice to the petitioner, does not rise to an issue of constitutional dimension. *Cox v. Cox*, 457 F.2d 1190 (3d Cir. 1972); *cf: Greene* at 453 (statute permitting posting of notice of forcible entry and detainer action in a conspicuous place on the premises was unlikely to provide tenants with actual notice of action.) If the courts are not allowed flexibility in interpreting and applying, under the circumstances of each case, their own rules regarding service of out-of-state defendants, those defendants who wish to turn the courts into sporting arenas will prevail.

2. THE JUDICIAL INQUIRY INTO THE ADEQUACY OF ATTEMPTED SERVICE WAS SUFFICIENT.

The petitioner argues that the respondent failed to comply strictly with Maine District Court Rule of Civil Procedure 4(g), and accordingly his due process rights were violated. He contends that the District Court's Order dated March 25, 1983, by simultaneously permitting service by publication and requiring a showing by the respondent of a diligent effort to serve the petitioner personally, was a violation of due process rights that would not have occurred if a prior separate judicial inquiry had been conducted into the diligence of respondent in attempting to serve petitioner. This argument overlooks the fact that the court made a series of inquiries, including the February, 1983 hearing, and its review of the affidavits submitted by respondent's counsel on December 13, 1982, and March 16, 1983, to determine the precise efforts counsel had employed to locate the petitioner. This latter affidavit incorporated copies of letters from petitioner's California counsel specifically seeking to negotiate the underlying alimony dispute.

Petitioner rests his entire argument on the insignificant question of whether a separate judicial inquiry into the diligence used by a plaintiff in serving an out-of-state defendant must be held before it will issue an order of publication. After service by publication was completed, a showing of due diligence was made, and the court satisfied itself that personal service could not have been made and that the alternative service previously authorized had been properly effected. The court entered its specific findings of fact, stating that respondent's prior attempts to serve petitioner and petitioner's California counsel constituted a sufficient showing of due diligence to authorize service by publication. The petitioner conceded that his substantive rights were not affected by this judicial timing. *Baker v. Baker,* 483 A.2d 733, 734 (Me. 1984). To allow a defendant to insist upon the precise order of service, even though he has in no way been prejudiced, is the essence of formalism. The purpose of service of process is to apprise the defendant that suit has been brought against him and to give him an opportunity to defend. *Mullane* at 314. Once it is found that this purpose has been

served, the inquiry should come to an end.[6]

Here, the petitioner had actual notice of the proceedings, and the respondent provided notice to the petitioner and his counsel of record in California by mail. The notice by mail, although not required by the Maine District Court Civil Rules, was a method added by the court as a reasonable means of providing notice to the petitioner. This Court has often noted that the mails provide an efficient and inexpensive means of communication which enhances the reliability of an otherwise unreliable notice procedure. *Mullane* at 319; *Greene* at 455. No due process violations exist. *Cox v. Cox* 457 F.2d 1190 (10th Cir. 1972) (notice by publication coupled with notice by mail to defendant and service upon defendant's attorney in most recent divorce proceedings did not violate due process); *Lehner v. U.S.*, 685 F.2d 1187 (9th Cir. 1982) (actual notice received by defendant; formal written notice of mortgage foreclosure sale not required); *FDIC v. Spartan Mining Co., Inc.*, 96 F.R.D. 677 (S.D. W.Va. 1983) (delivery of summons and complaint to corporate address and actual notice of individual defendants who were officers of corporation held sufficient).

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6. Further, petitioner erroneously states that after the March 25, 1983 Order was entered, "no inquiry was held into whether or not any of these methods of service other than publication had been successful." *Petition for Certiorari* at 9. On May 11, 1983, the court heard respondent's counsel regarding the attempts to complete service under the five-step order of service and received the affidavit of respondent's counsel, dated May 10, 1983, along with the letter sent by registered mail to the petitioner, returned to respondent's attorney by the Post Office.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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